

UNITED STATES PATENT AND TRADEMARK OFFICE  
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April 23, 2021

Opposition No. 91237315

*American Marriage Ministries*

*v.*

*Universal Life Church Monastery Storehouse,  
Inc.*<sup>1</sup>

**Jennifer L. Elgin, Interlocutory Attorney:**

This proceeding now comes up for consideration of:

- (1) Applicant's motion (filed October 29, 2020) to (a) order Opposer to serve on Applicant copies of the transcripts and exhibits for all testimony depositions conducted by Applicant, (b) strike Opposer's Notice of Reliance and Exhibits A-B, I-K, and U-Z submitted therewith, and (c) extend Applicant's trial period ("motion to strike");<sup>2</sup>
- (2) Applicant's motion (filed December 9, 2020) to reopen the time to file a reply brief in support of its motion to strike;<sup>3</sup>
- (3) Opposer's cross-motion (filed December 11, 2020) to strike Applicant's reply brief;<sup>4</sup> and

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<sup>1</sup> The Board notes the September 4, 2020 appearance of Michael B. Galletch as additional counsel for Applicant, 37 TTABVUE, and has updated its records accordingly. Record citations are to TTABVUE, the Board's publicly available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

<sup>2</sup> 46 TTABVUE. Record citations are to TTABVUE, the Board's publicly available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

<sup>3</sup> 59 TTABVUE.

<sup>4</sup> 60 TTABVUE.

(4) The parties' stipulated motions: (a) to extend Opposer's trial period until September 11, 2020 (filed September 9, 2020);<sup>5</sup> (b) to extend Applicant's trial period until December 7, 2020 and reset remaining deadlines (filed November 9, 2020);<sup>6</sup> and (c) to extend Applicant's trial period until December 15, 2020 and reset remaining deadlines (filed December 4, 2020).<sup>7</sup>

The Board also considers, sua sponte, Opposer's "Notice of Errata on Opposer's Notice of Reliance" ("Notice of Errata").<sup>8</sup>

The Board has considered the pending motions, but for the sake of efficiency does not repeat or discuss all of the arguments or submissions, and does not address irrelevant arguments. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

## **I. Motions to Extend Granted**

The background to this proceeding can be found in the Board's June 26, 2020 denial of Opposer's motion for summary judgment, which order also reset the procedure deadlines.<sup>9</sup>

The Board **grants** the parties' stipulated motions to extend time.<sup>10</sup> Accordingly, Opposer's rebuttal trial period closed January 29, 2021.<sup>11</sup>

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<sup>5</sup> 38 TTABVUE.

<sup>6</sup> 53 TTABVUE.

<sup>7</sup> 57 TTABVUE.

<sup>8</sup> 44, 45 TTABVUE.

<sup>9</sup> See 36 TTABVUE 13-14.

<sup>10</sup> See notes 5, 6, and 7, *infra*.

<sup>11</sup> 57 TTABVUE 2.

## II. Opposer's Untimely "Notice of Errata" Accepted

On September 9 and 10, 2020, Opposer filed a Notice of Reliance accompanied by 26 exhibits.<sup>12</sup> On September 25, 2020, after close of its testimony period, Opposer filed "Opposer's Notice of Errata on Its Notice of Reliance" which purports to correct and supplement five "clerical errors" in Opposer's initial filings.<sup>13</sup> The Notice of Errata includes an entirely new "Exhibit I" and additional documents omitted or mislabeled in Opposer's original filing.<sup>14</sup> In its discretion, the Board construes the "Notice of Errata" as a motion to reopen Opposer's time to submit a corrected notice of reliance.

A party wishing to reopen a time period that has closed must set forth with particularity detailed facts demonstrating its failure to timely act was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); *Gaylord Entm't Co. v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1371-72 (TTAB 2000). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 509.01(b) (2020). The excusable neglect determination is equitable, and must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the responding party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of movant, and (4) whether the movant acted in good faith. *See*

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<sup>12</sup> 39, 40, 41, 42, 43 TTABVUE.

<sup>13</sup> 44-45 TTABVUE.

<sup>14</sup> *Id.* The corrected Exhibit I was filed entirely under seal and without a public version, although the motion for partial summary judgment and most of the exhibits consist of largely public information. *Compare* 45 TTABVUE (filed under seal) *with* 21, 22 TTABVUE (only Exhibit C filed under seal).

*Pioneer Inv. Serv. Co. v. Brunswick Assoc. L.P.*, 507 U.S. 380, 396-97 (1993); *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1585-86 (TTAB 1997) (explaining Supreme Court’s analysis in *Pioneer*). Ultimately, the determination of whether or not a party’s neglect is excusable lies within the discretion of the Board. *FirstHealth of the Carolinas, Inc. v. CareFirst of Md., Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921 (Fed. Cir. 2007).

Here, the first, second, and fourth *Pioneer* factors weigh in favor of excusable neglect in that there is little prejudice to Applicant as it was already in possession of the materials and Applicant’s testimony period had not yet opened, the two-week delay was minimal, and there is no evidence of record that Opposer acted in bad faith. As to the third *Pioneer* factor, the only reason supplied by Opposer for the delay is a vague allegation of “clerical error.”<sup>15</sup> Although such errors were in the reasonable control of Opposer, the Board finds that the third *Pioneer* factor is outweighed by the other three factors, and therefore excusable neglect has been established. Accordingly, Opposer’s September 25, 2020 filings are **accepted** and made of record.

### **III. Applicant’s Motion to Strike Granted in Part**

Turning next to Applicant’s motion to strike, the Board first addresses Applicant’s motion to reopen the time to file its reply brief and Opposer’s motion to strike the brief.<sup>16</sup> Applicant, supported by the declaration of its counsel, contends it experienced

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<sup>15</sup> 44 TTABVUE 2-3.

<sup>16</sup> 59 TTABVUE, 60 TTABVUE. The Board also construes Opposer’s motion to strike the reply as an opposition to Applicant’s motion to reopen. The Board notes that captioning an opposition as a motion invites full briefing of a second motion, which is rarely useful and usually only delays resolution of the motion.

technical issues with electronically filing the reply via the Board's ESTTA system on the last day of the period, December 8, 2020 and was not able to complete the filing until the morning of December 9, 2020. Accordingly, Applicant argues the Board should reopen the time for filing the brief under the "excusable neglect" standard of Fed. R. Civ. P. 6(b).<sup>17</sup>

Pursuant to Trademark Rule 2.127(a), a reply brief "shall be filed within twenty days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be extended or reopened." Because acceptance of Applicant's late reply would violate the provisions of Rule 2.127(a), the decision to accept the brief is not within the Board's discretion. *See Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 USPQ2d 2009, 2010 (TTAB 2013) (Board's approval of consented motion to extend time to file reply was in error).

In view thereof, Applicant's motion to reopen is **denied** and the reply brief has not been considered.<sup>18</sup> However, the Board takes note of Applicant's withdrawal of some of its objections in its reply.<sup>19</sup>

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<sup>17</sup> 59 TTABVUE 2-4. *See also id.* at 6-7 (Declaration of Michael P. Matesky, II). The Board notes the proper way to handle filing if ESTTA is unavailable is to use an alternative method of filing, such as U.S. Mail, accompanied by an explanation of the technical difficulties or extraordinary circumstances experienced. *See* Trademark Rule 2.126, 37 C.F.R. § 2.126. *See also* TBMP §§ 110, 111 and <<http://www.uspto.gov/trademarks/ttab/filing-ttab-documents-during-outage>>.

<sup>18</sup> Accordingly, Opposer's motion to strike Applicant's reply is **moot**.

<sup>19</sup> *See* 58 TTABVUE 5-6; *see also* 68 TTABVUE 15-16.

### **A. Legal Analysis**

The parties agree that only two disputed issues remain for the Board's consideration: (1) the adequacy of the statements of relevance in Opposer's Notice of Reliance as required by Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g); and (2) the admissibility of Exhibits I, J, and K to Opposer's Notice of Reliance.<sup>20</sup>

#### **1. Motion to Strike Based on Statements of Relevance Denied**

Applicant first contends Opposer has not asserted sufficient statements of relevance in its notice of reliance. Opposer argues, inter alia, that Applicant's motion to strike was filed after the onset of Applicant's testimony period, and therefore Applicant has waived its objections as to Opposer's statements of relevance.<sup>21</sup>

Ordinarily, a procedural objection to a notice of reliance should be raised promptly, preferably by motion to strike if the defect is one that can be cured. *See* Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g); *see also* TBMP § 707.02(b). If the objection which is one that could have been cured promptly, and was not timely raised (before the opening of the next testimony period following that in which the material was offered into the record), the objection is deemed to be waived. *See Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1846-47 (TTAB 2017) (citing *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010)).

The Board has held that the adequacy of relevance statements is a curable defect that is waived if not timely raised. *Compare Barclays Capital Inc. v. Tiger Lily*

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<sup>20</sup> *See* 68 TTABVUE 16.

<sup>21</sup> 56 TTABVUE 5-7.

*Ventures Ltd.*, 124 USPQ2d 1160, 1163 (TTAB 2017) (finding objections to relevance statements filed before testimony period timely raised) *with Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1846-47 (finding objections to relevance statements waived when not raised until final brief). Accordingly, because Applicant's motion to strike based on the adequacy of the statements of relevance was untimely filed, the motion as to this basis is **denied**.<sup>22</sup>

## **2. Motion to Strike Based on Improper Submission of Exhibits Granted In Part**

Applicant next moves to strike three of Opposer's exhibits as improperly submitted under a notice of reliance:<sup>23</sup>

- **Exhibit I:** Opposer's Motion for Partial Summary Judgment, with the declarations of Nancy Stephens with attached exhibits and the declaration of Lewis King;<sup>24</sup>
- **Exhibit J:** Opposer's Reply in Support of its Motion for Partial Summary Judgment;<sup>25</sup> and
- **Exhibit K:** Declaration of Dylan Wall in Support of Opposer's Reply in Support of its Motion for Partial Summary Judgment and attached exhibits.<sup>26</sup>

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<sup>22</sup> The parties should note that, even if an adverse party fails to lodge a timely objection, the Board may sua sponte decline to consider proffered evidence if the notice of reliance does not sufficiently specify the relevance of the materials and identify the issues. *See, e.g., Safer, Inc.*, 94 USPQ2d at 1040; *see also* TBMP § 704.02.

<sup>23</sup> The propriety of submission of evidence under a notice of reliance is not a curable error and may be considered by the Board even if not raised prior to final briefing. *Colt Indus. Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983) (objection raised in brief that items submitted by notice of reliance were neither official records nor printed publications sustained).

<sup>24</sup> 45 TTABVUE.

<sup>25</sup> 43 TTABVUE 145-58.

<sup>26</sup> *Id.* at 159-311. The exhibits attached to the Wall declaration generally include internet publications, discovery responses, a spreadsheet, discovery deposition excerpts, and emails.

Opposer concedes the briefs contained in Exhibits I and J are not evidence.<sup>27</sup> *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 91 USPQ2d 1409, 1415 (Fed. Cir. 2009) (reasoning that a party’s “unsworn attorney argument ... is not evidence” and cannot rebut record evidence); *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”); *In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (“Statements in a brief cannot take the place of evidence.”).

Exhibits I and K also contain the declarations of Nancy Stephens, Lewis King and Dylan Wall in support of Opposer’s motion for summary judgment. Applicant asserts, and Opposer does not contest, that Ms. Stephens and Mr. Wall were not properly identified as witnesses in Opposer’s pretrial disclosures.<sup>28</sup>

Moreover, declarations are not among the types of evidence admissible by notice of reliance. Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g). To the extent Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1), allows parties to submit “testimony” by “an affidavit or a declaration,” absent a stipulation or Board order a testimony affidavit or declaration must be taken—that is, executed—during the assigned testimony period. Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a). *See Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at \*3-4 (TTAB 2019) (holding affidavit or declaration must be executed during the party’s assigned testimony period, unless submitted as an exhibit to other testimony and affirmed

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<sup>27</sup> *See* 56 TTABVUE 8.

<sup>28</sup> 46 TTABVUE 10. *See also* 56 TTABVUE 8-9.



therein) (subsequent history omitted). The three declarations at issue here, however, were executed well prior to Opposer's testimony period and therefore are not properly of record.

Applicant next argues the Board struck a number of the exhibits attached to the Stephens and Wall declarations from consideration in the Board's order denying Opposer's summary judgment motion.<sup>29</sup> Opposer contends in response that Applicant fails to set forth specific evidentiary objections as to why the previously stricken evidence should be excluded from consideration now.<sup>30</sup>

Upon review of the record, the Board finds that Opposer has engaged in a "belt and suspenders" approach by submitting *all* of its summary judgment exhibits (many exhibits improperly submitted under seal, and including evidence previously stricken by the Board) on top of what appears to be cumulative and duplicative evidence submitted separately under Opposer's notice of reliance *and* as exhibits to Opposer's oral testimony depositions.<sup>31</sup> This tactic has needlessly resulted in an overlarge, complex, and cluttered record.

In view of the foregoing, and in the promotion of judicial efficiency, the Board **grants** Applicant's motion to strike Exhibits I, J, and K to Opposer's notice of reliance, with leave to refile in part as specified below.

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<sup>29</sup> 46 TTABVUE 10-11; *see* 36 TTABVUE 4-7 (striking documents at 21 TTABVUE 72-82 for lack of authentication).

<sup>30</sup> 56 TTABVUE 8-9.

<sup>31</sup> *See, e.g.*, 74 TTABVUE 216-49.

## **B. Leave to Supplement Granted**

The Board grants Opposer leave, within **five days** of the date of this order, to file a supplemental notice of reliance accompanied by any of the previously-submitted exhibits to the Wall and Stephens declarations that Opposer contends are (i) appropriate for submission under a notice of reliance under Trademark Rule 2.122(g),<sup>32</sup> (ii) properly formatted under the Board's rules,<sup>33</sup> AND (iii) not cumulative or duplicative of evidence already of record.<sup>34</sup> Any documents containing confidential information should publicly filed with confidential information redacted and the corresponding unredacted documents filed under seal.

In addition, the Board finds Opposer's Notice of Errata confusing. Rather than file entire replacement exhibits, Opposer filed supplemental numbered pages and failed to instruct the Board precisely how they should be considered in association with Opposer's original filing.<sup>35</sup> This complicates the Board's ability to make a timely and informed decision in this proceeding.

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<sup>32</sup> See *WeaponX Perf. Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1037-38 n.12 (TTAB 2018) ("Normally, exhibits filed under a notice of reliance consist of pleaded registrations, pleaded applications, printed publications, official records, Internet materials, written disclosures of an adverse party, discovery depositions of the adverse party, and certain written discovery responses of an adverse party."). See also TBMP § 704.02.

<sup>33</sup> See, e.g., *Safer, Inc.*, 94 USPQ2d at 1040 (internet materials must contain URL and date); see also TBMP 704.08(b).

<sup>34</sup> For example, if an entire internet article has been submitted, Opposer should not re-file an excerpt or screenshot of the same article; similarly, if a document has been identified as an exhibit to a testimony deposition or under another exhibit to Opposer's notice of reliance, it should not be re-filed.

<sup>35</sup> For example, the Board believes, but is not certain, that "Bates Nos. AMM NOR 00089-00127" (44 TTABVUE 5-43) should be associated with Exhibit B to Opposer's Notice of Reliance and inserted after 39 TTABVUE 101.

Accordingly, Opposer is ordered to file a cross-reference of all remaining exhibits to its first notice of reliance (e.g. exhibits that have not been not stricken herein or withdrawn from consideration) and the page numbers **in TTABVUE** that should be associated with such exhibits (including any additional or substitute documents submitted with the Notice of Errata) within **five days** of the date of this order.

#### **IV. Proceeding Remains Suspended**

The parties' testimony periods are **closed**.

In light of the Board's rulings herein, the Board finds that no additional time for Applicant to submit additional evidence or testimony is needed. The Board, however, notes Opposer's election (filed December 28, 2020) to orally cross-examine Applicant's witness Brian Wozeniak. 67 TTABVUE. If Opposer has not yet completed the cross-examination, it should so inform the Board within **five days** of this order.

Proceedings remain otherwise **suspended**. The briefing schedule will be reset upon Opposer's response to this order, as set forth above.